No. 88-192

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

MCKESSON CORPORATION,
Petitioner,

VS.

DIVISION OF ALCOHOLIC BEVERAGES and TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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QUESTION PRESENTED

1. Under what circumstances may a state that enacts a tax that is unconstitutional under the Commerce Clause refuse to grant an injured taxpayer any refund of the collected taxes?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner McKesson Corporation, the respondents Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, State of Florida, and intervenors Jacquin-Florida Distilling Company, Inc. and Todhunter International, Inc.

The respondents before this Court include the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, State of Florida.

Petitioner's Rule 28.1 list is attached as Appendix A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

No.

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The petitioner McKesson Corporation ("McKesson") respectfully prays that a writ of certiorari issue to review the final decree and opinion of the Supreme Court of Florida, entered in this action on February 18, 1988.

OPINIONS BELOW

The Supreme Court of Florida's final decree and opinion is reported at 524 So. 2d 1000, and is reprinted as Appendix B, 2a.

The Florida circuit court's order, which has not been reported, is reprinted as Appendix C, 24a.

JURISDICTION

The Supreme Court of Florida entered its final decree on February 18, 1988, and denied McKesson's timely motion for rehearing on May 2, 1988. McKesson's motion for rehearing is reprinted as Appendix D, 29a. The order denying McKesson's motion and the Court's mandate are reprinted as Appendix E-F, 36a-38a.

McKesson invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action involves the United States Constitution's Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. The action also involves sections 564.06 and 565.12, Florida Statutes (1985). The Florida statutory provisions are reprinted as Appendix H, 44a.

STATEMENT OF THE CASE

The Florida Products Exemption

Before the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), declaring a Hawaii liquor tax exemption for local products unconstitutional under the Commerce Clause, Florida's alcoholic beverage laws granted an

excise tax exemption to beverages manufactured and bottled in Florida from Florida products ("Florida Products Exemption"). (Appendix G, 39a) The Florida legislature adopted the Florida Products Exemption "to protect and encourage state industry," *Jacquin-Fla. Distilling Corp. v. Dep't of Business Regulation*, 356 So. 2d 340, 341 (Fla. Dist. Ct. App. 1978). The similarity between the Florida law and the Hawaii law that this Court declared unconstitutional in *Bacchus* prompted the Florida legislature to alter the language of the Florida statutes.

The Revised Florida Products Exemption

During the legislative committee hearings to consider changes to the old Florida Products Exemption, Florida industry lobbyists pressed the legislature to maintain the protection of local industry. In response, the legislature enacted sections 564.06 and 565.12, Florida Statutes (1985) ("Revised Florida Products Exemption"). (Appendix H, 44a) The legislature removed the word "Florida" from the sections and, instead, substituted language identifying certain agricultural products whose use would entitle the manufacturers and distributors to tax advantages.

One Florida sponsor of the new legislation explained to a committee that the changes were designed "simply to retain what we have done for the last twenty years." Another legislator explained that the drafters tried to "structure the law so that the word 'Florida' is not in there and yet you are using primarily Florida products." He noted, "I don't think anyone really argues with that."

The Revised Florida Products Exemption provided tax advantages for alcoholic beverages manufactured exclusively from Florida's predominant products, citrus and sugarcane. In addition, Florida, which cannot produce the most common grape species used to manufacture wine and wine coolers, *Vitis Vinifera*, designated for preferential treatment the grape species that Florida does produce. The new Florida tax statutes also established certain criteria for denying the tax advantages to out-of-state firms even if they used the favored products.

McKesson's Action

On September 3, 1986, McKesson, which distributed alcoholic beverages at wholesale in Florida and which paid excise taxes under sections 564.06 and 565.12, Florida Statutes (1985), filed an action in Florida state court challenging Florida's alcoholic beverage tax scheme as unconstitutional under the federal and state constitutions. Specifically, McKesson alleged that the tax scheme discriminated against interstate and foreign commerce in violation of the federal Constitution's Commerce Clause and Import-Export Clause. McKesson in its Complaint prayed that the court declare the Florida statutes unenforceable and also requested a refund of the unconstitutionally collected taxes.

McKesson filed motions for partial summary judgment and for a preliminary injunction. On March 20, 1987, the circuit court entered an order that found that McKesson has standing to challenge the constitutionality of the tax statutes and that declared unconstitutional those portions of the statutes that grant tax exemptions or preferences. The court's order included a preliminary injunction that enjoined the State from enforcing the unconstitutional statutory provisions.

McKesson in its motion for partial summary judgment did not raise the issue of McKesson's entitlement to a refund of the unconstitutional taxes. Nevertheless, the circuit court proceeded to resolve the issue, stating in its order that its declaration of unconstitutionality would operate only prospectively.

On the same day, March 20, 1987, the State filed a Notice of Appeal, which automatically caused a stay of the circuit court's order under Fla. R. App. P. 9.310(b)(2). On April 15, 1987, McKesson filed its notice of cross appeal. McKesson in its cross appeal challenged the circuit court's decision to restrict its declaration of unconstitutionality and thereby bar retroactive relief. On April 13, 1987, the District Court of Appeal, First District, certified that the case on appeal was of great public importance requiring immediate resolution by the Florida Supreme Court.

On February 18, 1988, a unanimous Florida Supreme Court issued its final decree, definitively disposing of all the legal and factual issues in the case. The Supreme Court affirmed the lower

court's order declaring unconstitutional those portions of the Revised Florida Products Exemption that granted tax exemptions or preferences. The Court found that "the tax scheme at issue places a clear discriminatory burden on interstate commerce . . ." and thereby conferred a competitive advantage on local industry. (Appendix B, at 11a) Quoting from *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980), the Florida Court acknowledged "the 'general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.' " (Appendix B, at 18a) The Court cited *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333 (1977), and specifically stated that the Florida law imposed a discriminatory burden similar to that in *Hunt*. (Appendix B, at 16a)

Despite the Florida Supreme Court's finding that the challenged tax scheme "clearly raises [McKesson's] relative cost of doing business" and otherwise disadvantaged McKesson in the Florida market (*Id.* at 17a), the Supreme Court refused to permit McKesson to seek any refund of taxes. The Court did not acknowledge that McKesson had never had an opportunity in the circuit court to address the issue of retroactive relief. Rather, the Court affirmed the circuit court's decision to deny any retroactive relief, citing, in two sentences, "equitable considerations." (*Id.* at 21a)

On March 3, 1988, McKesson, in a motion for rehearing, asserted that the Florida Supreme Court's peremptory denial of any relief for the constitutional injury McKesson sustained during the period that Florida collected discriminatory taxes overlooks both federal constitutional law and the Florida Supreme Court's own previous decisions. (Appendix D, 29a) McKesson also noted that no Florida court had ever permitted McKesson to present evidence on the effect of the discriminatory taxes on its business. (*Id.* at 32a) McKesson asked the Florida Supreme Court to determine that McKesson is entitled under both federal constitutional law and state law to receive a tax refund, and to remand the case to the lower court to receive evidence to determine the amount of an appropriate refund. Alternatively, McKesson asked

the Court to remand the case to the lower court to hear evidence on the issue of McKesson's competitive injury and then to weigh the particular equities in determining the measure of any relief. (*Id.* at 34a-35a)

On May 2, 1988, the Florida Supreme Court denied, without an opinion, McKesson's motion for rehearing and issued its mandate.

The Revised, Revised Florida Products Exemption

After the Florida Supreme Court declared unconstitutional the Revised Florida Products Exemption, the Florida legislature recognized that Florida's alcoholic beverage tax statutes no longer discriminated against out-of-state commerce and no longer favored Florida products. The Florida Supreme Court's decision in this case had excised the Florida tax statutes' discriminatory provisions so that the statutes imposed the same tax on out-of-state products as on local products. Therefore, a few months after the Florida Supreme Court's decision, the Florida legislature enacted a new revised tax scheme. The new Florida tax scheme taxes alcoholic beverages produced in Florida at one rate and taxes alcoholic beverages produced out-of-state at another rate, many times higher. (Appendix I, 56a)

REASONS FOR GRANTING THE WRIT

I

THIS COURT'S COMMERCE CLAUSE DECISIONS HAVE NOT PREVENTED FLORIDA AND OTHER STATES FROM DENYING TAXPAYERS EFFECTIVE RELIEF FOR DISCRIMINATORY STATE TAXATION

Under the Commerce Clause, each state may not " 'legislate according to its estimate of its own interests [and] the importance of its own products . . . .' " *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (quoting Story, *The Constitution*, §§ 259, 260). However, state legislatures, which reflect the interests of their constituents, often legislate in response to protection-

ist pressures. The legislatures' protectionist acts threaten our national common market.

Indeed, this Court's Commerce Clause decisions recognize that state legislatures understandably respond to constituent pressures and regularly act to protect the parochial interests within their states. As out-of-state businesses generally cannot exert counterbalancing pressures, state legislatures often enact legislation that promotes local commerce at the expense of interstate commerce. Therefore, this Court consistently has recognized the need for judicial vigilance in enforcing the Commerce Clause. *See, e.g., Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981); *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940). Since judicial review under the Commerce Clause "rests on the premises that unaccountable power is to be carefully scrutinized and that legislators are accountable only to those who have the power to vote them out of office, it is inevitable that this approach counsels frequent and probing judicial intervention. . . ." L. Tribe, *American Constitutional Law* § 6-5 at 411 (2d ed. 1988).

While state legislatures respond to political pressures supporting protectionism, state courts, under the federal Constitution, are obligated to check discrimination and protect the rights of parties engaged in interstate commerce. In numerous Commerce Clause cases, this Court has established parameters for states' taxation of interstate commerce. Moreover, in this century, the Court has addressed the issue of the appropriate remedy for discriminatory taxes collected in violation of federal law.

In *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 285 (1912) (finding a tax an unconstitutional burden upon interstate commerce), Justice Holmes stated:

> [i]t is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that, apart from special circumstances, he cannot interfere by injunction with the state's collection of its revenues, an action at law to recover back what he has paid is the alternative left.

In *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930), the Court determined that "a denial by a state court of a recovery of taxes

exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the 14th Amendment."

In *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931), the Court stated that "it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid," but rather is entitled to obtain a refund of the excess taxes. *See also Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 343 (1964) (affirming a refund of taxes on basis of violation of Export-Import Clause).

However, despite state courts' obligation to enforce the Constitution and provide a remedy for discriminatory taxation, state courts often resist granting tax refunds to injured taxpayers. In numerous cases, state courts have determined that the states unconstitutionally collected taxes, but nevertheless have permitted the states to retain the unconstitutional taxes. *See, e.g., Am. Trucking Ass'n v. Gray*, 746 S.W. 2d 377 (Ark. 1988); *Nat'l Can Corp. v. State Dep't of Revenue*, 749 P.2d 1286 (Wash. 1988), *appeal dismissed*, 108 S. Ct. 2030 (1988); *Penn Mut. Life Ins. Co. v. Dep't of Licensing & Regulation*, 412 N.W. 2d 668 (Mich. Ct. App. 1987); *Ashland Oil, Inc. v. Rose*, 350 S.E. 2d 531 (W. Va. 1986), *appeal dismissed*, 107 S. Ct. 1949 (1987); *Private Truck Council of Am., Inc. v. Secretary of State*, 503 A. 2d 214 (Me. 1986), *cert. denied*, 476 U.S. 1129 (1986); *Metropolitan Life Ins. Co. v. Comm'r of Dep't of Ins.*, 373 N.W. 2d 399 (N.D. 1985); *Salorio v. Glaser*, 461 A. 2d 1100 (N.J. 1983), *cert. denied*, 464 U.S. 993 (1983).[1]

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[1] In *Am. Trucking Ass'n v. Gray*, 746 S.W. 2d 377 (Ark. 1988), for example, the Supreme Court of Arkansas stated that " 'whatever chill was imposed on interstate trade is in the past.' " *Id.* at 379 (quoting from *Nat'l Can Corp. v. State Dep't of Revenue*, 749 P.2d 1286 (Wash. 1988)). The Arkansas Court failed to note that since taxpayers invariably pay the state taxes before challenging them, an unconstitutional tax scheme always imposes the "chill" on interstate trade in the past.

In this case, the Florida Supreme Court held that the Revised Florida Products Exemption violated the Commerce Clause but the Court refused even to allow McKesson the opportunity to present evidence of the corporation's economic injury during the period of the unconstitutional discrimination. The Florida Court, like other state courts, rejected retroactive relief. While the Court's decision protected the state treasury, the Court essentially nullified the Commerce Clause's protection for McKesson and other parties engaged in interstate commerce.

The Florida Court's decision and other state court decisions denying any retroactive relief for discriminatory taxation do not effectively enforce the Commerce Clause's proscription against protectionism. By embracing doctrines of nonretroactivity, states may avoid any liability for imposing a discriminatory burden on interstate commerce. Without any fear of liability, any state may enact successive discriminatory statutes that emasculate the Commerce Clause's protection for our national common market.

This Court need not rely on hypothesis. Florida has provided a case study. Several months after this Court's decision in *Bacchus* declared the discriminatory Hawaii tax unconstitutional, the Florida legislature replaced the original discriminatory Florida tax scheme with a revised discriminatory tax scheme. A few months after the Florida Supreme Court declared the revised Florida tax scheme unconstitutional, but rejected any measure of liability, the Florida legislature enacted a revised, revised discriminatory tax scheme. Florida's original tax scheme imposed significantly greater costs on interstate commerce than on local commerce; Florida's revised tax scheme continued to impose significantly greater costs on interstate commerce than on local commerce; and now the revised, revised tax scheme continues the tradition.

For example, under Florida's original tax scheme, a distributor of locally produced wine that contained 10 percent alcohol by weight paid no Florida taxes on the wine. A distributor of California wine that contained 10 percent alcohol by weight paid $2.25 per gallon in Florida taxes.

Under Florida's revised tax scheme, a distributor of locally produced wine that contained 10 percent alcohol by weight paid

no Florida taxes on the wine. A distributor of California wine that contained 10 percent alcohol by weight paid $2.25 per gallon in Florida taxes.

Under Florida's revised, revised tax scheme, a distributor of locally produced wine that contains 10 percent alcohol by weight pays $0.25 per gallon in Florida taxes on the wine. A distributor of California wine that contains 10 percent alcohol by weight pays $2.25 per gallon in Florida taxes. Apparently, the more things change, the more they remain the same.

McKesson has litigated the constitutionality of Florida's alcoholic beverage tax scheme for almost two years. However, even after a Florida Supreme Court decision holding the Revised Florida Products Exemption unconstitutional, any distributor of out-of-state products still does not enjoy parity with local competitors. The Florida Supreme Court's denial of retroactive relief implicitly motivates the legislature to continue to discriminate against interstate commerce. The Florida Court's decision in concert with the Florida legislature's enactments has effectively denied McKesson any relief in this case—either retroactive or prospective—for Florida's violation of the Commerce Clause.

Florida's manipulation of principles of retroactivity and prospectivity serves as a paradigm for other states interested in avoiding any liability for violating the Commerce Clause. Further, McKesson's experience in challenging Florida's Commerce Clause violation, to date, serves as a disincentive to other parties contemplating a challenge to other Commerce Clause violations. *See, e.g.*, Mishkin, *The Supreme Court 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 60-61 (1965)

In *Nippert v. City of Richmond*, 327 U.S. 416, 433-34 (1946), this Court observed that provincial interests can exert powerful legislative pressure in support of discrimination against interstate commerce to the advantage of local interests. The Court stated:

> [t]he problem comes down therefore to whether the state or municipal legislative bodies in framing their taxing measures to reach interstate commerce shall be at pains to do so in a

> manner which avoids the evils forbidden by the commerce clause. . . .

Id. at 434. In fact, state legislatures will not be at pains to avoid enacting taxing measures that violate the Commerce Clause if they may enact such laws with impunity. If states may pass laws that discriminate against interstate commerce, to the advantage of local business, and then avoid liability for any measure of relief for the harm to taxpayers engaged in interstate commerce, the states will have little incentive to enact constitutional, rather than protectionist, legislation.

II

THIS COURT SHOULD ARTICULATE THE CONSTITUTIONAL LIMITATIONS ON STATES' RETENTION OF UNCONSTITUTIONAL, DISCRIMINATORY TAXES

To date, this Court has declined to resolve federal constitutional issues regarding the appropriate remedy for a taxpayer injured by a state's violation of the Commerce Clause. The Court has preferred to allow the state courts to address the federal and state issues in the first instance. *See, e.g., Tyler Pipe Industries, Inc. v. Wash. State Dep't of Revenue*, ____ U.S. ____, 107 S. Ct. 2810, 2822-23 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984).[2] However, as state courts increasingly refuse to enforce the Commerce Clause effectively by rejecting retroactive relief for discriminatory taxes, this Court should intervene to decide whether the federal Constitution demands greater consideration of our national interest in interstate commerce.

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[2] In contrast to *Bacchus*, in this case, the Florida Supreme Court did resolve McKesson's right to relief. The Florida Court, which did not find a federal right to relief, also denied any state law right to relief by reinterpreting its earlier decisions that had provided a refund remedy to litigants who had paid unlawful taxes. *See, e.g., Tampa v. Birdsong Motors, Inc.*, 261 So. 2d 1, 7 (Fla. 1972); *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So. 2d 993, 995 (Fla. 1976); *Osterndorf v. Turner*, 426 So. 2d 539, 541, 545 (Fla. 1982); *Tampa v. Thatcher Glass Corp.*, 445 So. 2d 578, 580 (Fla. 1984); *Colding v. Herzog*, 467 So. 2d 980, 983 (Fla. 1985).

The Florida Supreme Court and other state courts, seeking to protect state treasuries in Commerce Clause cases, too often have ignored the threat to interstate commerce.

> The complete denial of refunds resolves the tension between these competing interests entirely in favor of the state. Such an unbalanced resolution threatens the very purpose of the commerce clause. Guidance from the [Supreme] Court is needed with respect to the appropriate balance between the refund rights of the taxpayer and the rights of the state.

Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer 103, 118-19 (1987-1988).[3]

Without this Court's guidance, state legislatures will continue to react to parochial pressures by enacting protectionist statutes. State courts will continue to protect state treasuries by declining to order any effective enforcement of the Commerce Clause. The state courts' denial of retroactive relief, at least in some cases, will provide an incentive for successive unconstitutional discrimination. Further, as this Court has recognized, when protectionism in one state spawns protectionism in other states, our nation experiences the balkanized commerce that Commerce Clause doctrine is designed to prevent. "Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the [Commerce] Clause protects." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (citation omitted). *See also* Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 77-78 (1988).

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[3] The Florida Supreme Court and other state courts, in rejecting taxpayers' claims for retroactive relief for unconstitutional tax statutes, have adopted an all or nothing approach. The Florida Court, for example, did not balance the equities to decide whether a limited refund or an installment refund would vindicate Commerce Clause concerns but minimize state treasury problems.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court adopted an analysis for determining whether a judicial decision should be applied retroactively or only prospectively. *Chevron* set forth a balancing test by which a court that announced a clearly new principle of law could avoid "penalizing" a party that had relied to its detriment on the preceding principle or rule. The Court in *Chevron* and in *Lemon v. Kurtzman*, 411 U.S. 192 (1973), acknowledged the departure from the Blackstonian conception in *Norton v. Shelby County*, 118 U.S. 425, 442 (1886), that an unconstitutional statute, in all cases and in all respects, "is, in legal contemplation, as inoperative as though it had never been passed." *See Lemon*, 411 U.S. at 198; 1 W. Blackstone, *Commentaries* *70. This Court's later decisions have confirmed that *Chevron* continues to govern the question of retroactivity in civil actions. *See Griffith v. Kentucky*, ____ U.S. ____, 107 S.Ct. 708, 713 n.8 (1987); *United States v. Johnson*, 457 U.S. 537, 563 (1982).

If this Court, implicitly, has directed state courts to apply the *Chevron* analysis in determining whether to grant retroactive relief for unconstitutional, discriminatory taxation, the Florida Supreme Court and other state courts are unaware. "Since many state courts have applied their own standards [rather than *Chevron*] to determine retroactivity of a decision holding a state tax unconstitutional, the issue would seem to cry out for clarification by the Court." Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer 103, 140-41 (1987-1988).

If the Florida Supreme Court had applied *Chevron* in this case, the Court would not reasonably have denied relief. The Florida Court's analysis would not have proceeded beyond *Chevron's* threshold test for nonretroactivity—whether the Florida Court's decision represented a new principle of law. *See Chevron*, 404 U.S. at 106-07; *United States v. Johnson*, 457 U.S. 537, 550 n.12, 551 (1982).[4] In its opinion, the Florida Court never suggests that

[4] The Florida Court cited *Lemon v. Kurtzman*, 411 U.S. 192 (1973), without discussion. However, in *Lemon* as in *Chevron*, the Court

its unanimous declaration of the unconstitutionality of the Revised Florida Products Exemption established a new principle of law, either by overruling past precedent or by deciding an issue of first impression. Instead, the Court stated that it based its decision on *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333 (1977).[5]

Instead, without mentioning *Chevron*, the Florida Supreme Court summarily dismissed McKesson's claim for relief. The Florida Supreme Court knew that no Florida court had ever seriously considered the federal Commerce Clause interests in McKesson's claim for retroactive relief for the unconstitutional tax statutes. The circuit court had resolved the question of retroactive relief without the parties' even presenting the issue and without receiving evidence on the issue. The Florida Supreme Court affirmed the lower court's denial of relief in two sentences concerning two "equitable considerations." Neither "consideration" withstands any scrutiny.

First, the Florida Supreme Court adopted an argument that would allow any Florida court in any case to prevent a taxpayer from recovering any portion of an unconstitutional tax. The Court stated that a state agency had implemented the "tax preference scheme . . . in good faith reliance on a presumptively valid statute." (Appendix B, at 21a) Of course, all Florida statutes, under Florida law, are presumptively valid until the Florida Supreme Court holds otherwise. *See A.B.A. Industries, Inc. v. Pinellas Park*, 366 So. 2d 761, 763 (Fla. 1979). Therefore, the Court's

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avoided inequitable harm to parties that would have resulted from applying a new principle of law retroactively. The Florida Court in this case did not establish a new principle of law.

[5] The Florida Department of Business Regulation must not have been surprised when it read the Florida Supreme Court's opinion declaring the statutes unconstitutional. Before Florida enacted the challenged tax scheme, the Department warned in a memorandum that the legislature's preservation of the Florida Products Exemption's discriminatory effect in the revised tax scheme would leave its constitutionality "substantially in doubt" and would expose state revenues to taxpayers' suits for refunds.

"consideration" would bar any taxpayer's claim for any refund of an unconstitutional tax.

Second, the Florida Supreme Court adopted an argument that ignored the economic effect of discriminatory taxes on interstate commerce. The Court stated that McKesson, if allowed to apply for a refund, "would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." (Appendix B, at 21a)

Neither the Florida Supreme Court nor any other Florida court ever questioned that McKesson had suffered an economic loss as a result of the unconstitutional Florida taxes. Indeed, every party to the litigation acknowledged that the Florida legislature enacted the discriminatory tax scheme to promote the use of Florida products. (*Id.* at 17a-18a) The Florida statutes simply made no sense unless they effectively advantaged Florida distributors of Florida products and disadvantaged McKesson and other distributors of other states' products. *See generally* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1110-1143 (1986). The Florida Supreme Court specifically noted that McKesson had sustained competitive injury as a result of the discriminatory tax scheme's raising McKesson's relative cost of doing business in Florida. (*Id.* at 17a) McKesson suffered an economic injury. If McKesson raised its prices to cover the discriminatory tax burden, the corporation lost market share to the favored competitors who did not have to cover the same tax costs. On the other hand, if McKesson did not raise its prices to cover the discriminatory taxes, the corporation's profits decreased.

Nevertheless, the Florida Supreme Court relied on a speculative "pass-on" argument in denying McKesson the opportunity to prove the economic facts of an unconstitutional discrimination. McKesson asked the Florida Supreme Court to permit the circuit court to consider McKesson's arguments concerning the unconstitutional taxes' specific economic impact on McKesson. The Court refused.

This Court's analysis of similar economic situations refutes the Florida Supreme Court's speculative argument. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267-68 n.7 (1984), the Court recognized that Hawaii's discriminatory alcoholic beverage tax injured the out-of state taxpayers when their products were taxed but local products were not. The Court, rejecting Hawaii's standing arguments, noted that "even if the tax is completely and successfully passed on, it increases the price of [the wholesalers'] products as compared to the exempted beverages, and the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business."[6] In this case, the Florida Supreme Court protected Florida's state treasury by denying McKesson the opportunity to present evidence of the adverse competitive impact of Florida's unconstitutional taxes. While states do, in fact, have legitimate concerns regarding disruptions to state budgets and preserving state treasuries, the Commerce Clause historically has enforced our overriding national interest in free, unrestricted trade among the states. *See Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). The federal constitutional interest in the Commerce Clause as a restraint on discriminatory state legislation is significant.

The Court in *Chevron* presumably did not replace the old rule demanding full retroactivity in all cases so that states could substitute another inexorable rule denying any retroactive relief in any tax refund claim against a state that has enacted unconstitutional tax statutes. In light of the Florida Supreme Court's and other state supreme court's decisions, this Court should articulate

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[6] This Court has rejected similar pass-on arguments in antitrust cases. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736-43 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 491-94 (1968). In *Hanover Shoe*, 392 U.S. at 493, the Court stated that—

> [e]ven if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued.

the federal Constitution's limitations on the states' retention of unconstitutional taxes.

CONCLUSION

Only this Court can provide federal constitutional guidance to ensure that state courts enforce the Commerce Clause in reviewing taxpayers' claims for relief from unconstitutional state tax statutes. The Florida Supreme Court's rejection of any retroactive relief to McKesson, without any serious consideration of the economic effect of the unconstitutional tax, squarely raises the issue of the federal Constitution's limitations on the states in their review of such claims. Petitioners in other cases in recent years have asked this Court to address the issue. McKesson respectfully submits that the Court needs to speak.

Dated: July 28, 1988

Respectfully submitted,

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APPENDIX A

Petitioner McKesson Corporation's
Rule 28.1 List of Parent Companies, Subsidiaries
(Except Wholly-Owned Subsidiaries)
and Affiliates

Adam Rack Distributors, Inc.

Armor All Products Corporation

Armor All Products of Canada, Inc.

Armor All Products GmbH

APC Chemicals, Inc.

City Properties, S.A.

Corporacion Bonima, S.A.

Comercial Farmaceutica Interamericana, S.A.

Comercial Interamericana, S.A. (Dom. Rep.)

Comercial Interamericana, S.A. (El Salvador)

Comercial Interamericana, S.A. (Guatemala)

Corporacion Interamericana, S.A.

Distribuidora Farmaceutica Calox Colombiana, S.A.

Investigaciones Farmoquimicas De Colombia, S.A.

Intercal, Inc.

Laboratorios Calox, C.A.

Mount Gay Distilleries Limited

Organizacion Farmaceutica Americana, S.A.

PCS, Inc.

APPENDIX B

SUPREME COURT OF FLORIDA

No. 70,368

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA, ET AL., Appellants/Cross-Appellees,

vs.

MCKESSON CORPORATION, ET. AL, Appellees/Cross-Appellants.

[February 18, 1988]

EHRLICH, J.

On June 29, 1984, the United States Supreme Court decided the case of *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984). In *Bacchus*, the Court struck down a Hawaii alcoholic beverage excise tax which exempted okolehao, a brandy distilled from the root of an indigenous shrub of Hawaii, and fruit wine manufactured in the state as being violative of the Commerce Clause, concluding that the exemption had both the purpose and effect of discriminating in favor of locally produced products. At the time of the *Bacchus* decision, sections 564.06 and 565.12, Florida Statutes (Supp. 1984), granted tax preferred treatment to alcoholic beverages made from certain base agricultural crops grown in Florida and manufactured and bottled in Florida. In response to the *Bacchus* decision, the Florida Legislature amended sections 564.06 and 565.12 in Chapters 85-203 and 85-204,

Laws of Florida. The amended provisions, as codified in sections 564.06 and 565.12 Florida Statutes (1985), among other things, grant exemptions or tax preferences to wines and distilled spirits manufactured from citrus, sugar cane and certain grape species, all of which will grow in Florida, or from by-products or concentrates thereof, no matter where the point of manufacture and disallow the tax preference to eligible alcoholic beverages under certain circumstances.

Three separate complaints were filed against the Division of Alcoholic Beverages and Tobacco (DABT) challenging the revised tax preference scheme: one by Tampa Crown Distributors, Inc. and Florida Beverage Corporation, licensed wholesale distributors of alcoholic beverages in Florida, one by McKesson Corporation, also a licensed wholesale distributor and the third by Brown-Forman Corporation, a manufacturer of wine coolers in California who sells its products to wholesalers in Florida for resale in the state. Tampa Crown, Florida Beverage and McKesson challenge the preference and disqualification provisions of both sections 564.06 and 565.12. Brown-Forman challenges only those of section 564.06. The primary claim in all three complaints was that the preference and disqualification provisions under the new tax scheme discriminated in favor of local commerce and against interstate commerce contrary to the mandates of *Bacchus*.

Jacquin-Florida Distilling and Todhunter International, manufacturers who benefit from the challenged preference scheme, intervened as defendants. The DABT raised a number of defenses to each complaint, including a claim that each plaintiff lacked standing to chal-

lenge the provisions in question. Tampa Crown/Florida Beverage and Brown-Forman filed motions for summary judgment and supporting affidavits. McKesson filed a motion for partial summary judgment and preliminary injunction. The trial court entered final summary judgments in favor of Tampa Crown/Florida Beverage and Brown-Forman and entered a partial summary judgment and preliminary injunction in favor of McKesson. In all three judgments, the trial judge found:

> These amendments were an effort by the legislature to overcome the constitutional problems in the Florida Alcoholic Beverages laws resulting from the *Bacchus* decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violations addressed in *Bacchus*.

The rulings were prospective in nature.

The DABT appealed those portions of the judgements finding the tax preference scheme unconstitutional. McKesson and Tampa Crown filed cross-appeals challenging the prospective nature of the rulings and the denial of their claims for a refund. The District Court consolidated the cases and certified the cause to this Court as involving a question of great public importance requiring immediate resolution. We have jurisdiction, article V, section 3(b)(5), Florida Constitution, and affirm.

First we address the DABT's claim that the appellees lack standing to challenge the "disqualification provisions" because none of them have "alleged or proved any harm to their business flowing from

those provisions." Each of the appellees claims that the *overall* tax preference scheme for alcoholic beverages, which is made up of both the exemption provisions and the disqualification provision of sections 564.06 and 565.12, discriminates against interstate commerce and thus, has an adverse competitive impact on their businesses. It is clear, under the *Bacchus* decision, that, as wholesale distributors and manufacturers of alcoholic beverages who are liable for taxes under Florida's alcoholic beverage tax scheme, the appellees have standing to litigate whether the allegedly discriminatory scheme has had an adverse competitive impact on their businesses. 104 S.Ct. at 3053; *see also Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311, 317 (Fla. 1984). Further, we agree that the appellees clearly have standing to assert their constitutional right to engage in interstate commerce free of burdens violative of the commerce clause. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977); *Mapco Inc. v. Grunder*, 470 F. Supp. 401, 405 (N.D. Ohio 1979).

COMMERCE CLAUSE

We next address the merits of the appellees' challenge under the Commerce Clause of the United States Constitution. The United States Supreme Court employs a two-tiered approach to analyzing state economic regulation under the Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 106 S.Ct. 2080 (1986). This approach was recently explained by the Court in *Brown-Forman* as follows:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed. 2d 475 (1978); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909 (1925); *Edgar v. MITE Corp.*, 457 U.S. 624, 640-43, 102 S.Ct. 2629, 2639-41, 73 L.Ed. 2d 269 (1982) (plurality opinion). When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity. *See Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440-441, 98 S.Ct. 787, 793-94, 54 L.Ed.2d 664 (1978).

106 S.Ct. at 2084-85.

The DABT argues that because any effect which the challenged tax preference scheme might have on interstate commerce is indirect and the tax is applied evenhandedly, the *Pike* balancing approach must be employed in this case. The DABT maintains that under that approach, the trial court erred in finding the challenged tax scheme violative of the Commerce Clause. The appellees, on the other hand, take the position that because the challenged provisions have both the purpose and effect of discriminating against interstate commerce, they were properly struck down by the trial court as "simple economic protectionism." They argue in the alternative that the preference

scheme cannot withstand scrutiny under the *Pike* balancing test. After reviewing the challenged provisions, in light of the record in this case, we agree with the appellees that, even under the *Pike* balancing test, summary judgment was properly entered in their favor.[1]

Section 564.06, Florida Statutes (1985) provides in pertinent part:

> Excise taxes on wines and beverages; exemptions. –
>
> (1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of $2.25 per gallon.
>
> (2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcoholic content is manufactured exclusively from citrus fruits, varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana* or *Vitis berlandierei*, citrus products, citrus byproducts, sugarcane, sugarcane byproducts, or from concentrates thereof, except for fla-

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[1] We find no merit to the DABT's claim that the trial court entered the summary judgments prematurely, thereby failing to allow the Department an adequant discovery period.

voring extracts, the tax imposed by subsection (1) shall not apply.

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by manufacturers and distributors a tax at the rate of $3 per gallon, except that this tax shall not be required to be paid upon all wines of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana,* or *Vitis berlandieri,* or from concentrates thereof, except for flavoring extracts and containing 14 percent or more of alcohol by weight.

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of $3.50 per gallon, except that this tax shall not be required to be paid upon all natural sparkling wines of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana,* or *Vitis berlandieri,* or from concentrates thereof, except for flavoring extracts.

. . .

(7) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.

. . .

(9) The exemptions from payment of taxes provided in subsections (2), (3), and (4) or the tax rates set forth in subsection (10) shall not apply:

(a) To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

(b) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

(c) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural produces used in making said alcoholic beverages.

Funding for research purposes or retail sale of wine at licensed wineries shall not be construed as an 'economic incentive or advantage' within the meaning of this subsection.

Section 565.12, Florida Statutes (1985), provides in pertinent part:

Excise tax on liquors and beverages. –

(1) (a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $6.50 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of $4.35 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide

agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(2) (a) As to beverages containing more than 48 percent of alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $9.53 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane by products, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of $4.95 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produces within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural produces used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

The appellees maintain that a review of the legislative history of the tax scheme at issue will "reveal the legislature's transparent intent to use the Revised Florida Products Exemption to effect economic protectionism." They argue that the exemption scheme was devised "to protect certain Florida agricultural products, and to protect the manufacturers using those products" at the expense of out-of-state products and the manufacturers using those products and that such a discriminatory purpose requires that the tax preference be found a per se violation of the commerce clause under *Bacchus*. Because we find that the tax scheme at issue places a clear discriminatory burden on interstate commerce which the state has failed to justify in terms of legitimate local benefits other than the admitted benefits to local industry flowing from the statute, we need not determine whether the challenged provisions were in fact enacted to serve some underlying protectionist purpose. *See Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 353 (1977).

The DABT bases its position that the tax scheme at issue is evenhanded in its application on the fact that an exemption or preference is granted based on the classification of crop from which an alcoholic beverage is made rather than upon the in-state origin of the beverage. Affidavits from several experts establish that 1) citrus and sugarcane are grown in Florida as well as in other areas of the United States and the world and 2) the specified grape species are grown throughout the Southeastern United States and the Atlantic States Regions. The DABT acknowledges that "[w]ithout question, [the]

provisions [at issue] may affect commerce by increasing the use of sugarcane and citrus in the manufacture of beverages," but maintains that "that effect is not a violation of the Commerce Clause." It contends that no "undue burden on interstate commerce" results from "the fact that some crops used in the interstate production of alcohol may be displaced by other crops grown and sold in the interstate market" or from the fact that there may be "a temporary displacement due to market adjustment." For this proposition, the DABT relies on decisions of the United Supreme Court in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), and the Colorado Supreme Court in *Archer Daniels Midland Co. v. State*, 690 P.2d 177 (Colo. 1984). We find the *Exxon* decision clearly distinguishable from the situation before us and question whether *Exxon* was properly applied by the Colorado Court in *Archer Daniels*.

In *Exxon*, the Supreme Court upheld a Maryland statute prohibiting producers and refiners of petroleum products – all of which were out-of-state businesses – from retailing gasoline in the state. The statute was enacted in response to perceived inequities in the allocation of petroleum products to retail outlets during the fuel shortage of 1973. In challenging the statute, various oil companies, all of which were engaged in production and refining, as well as in the retail sale of petroleum products, argued that the statute violated the Commerce Clause by discriminating against producers and refiners, all of which were interstate businesses, in favor of independent retailers, most of which were local businesses. In rejecting this contention the Court first found that the statute served the legitimate state purpose of "controlling the gasoline retail market." 437 U.S. at 125. The Court

went on to reject claims of discrimination at both the producing-refining and retailing ends of the petroleum industry. The Court concluded that the statute could not discriminate against interstate petroleum producers and refiners in favor of locally based competition because there were no locally based producers and refiners. The claim of discrimination at the retail level was also rejected because the statute placed "no barriers whatsoever" on competition in local markets by interstate independent dealers. The Court found the situation presented in *Exxon* distinguishable from cases such as *Hunt* and *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), in which a state has been found to have discriminated against interstate commerce, because the statute in *Exxon* was found "not [to] prohibit the flow of interstate goods, [to] place added costs upon them, or [to] distinguish between in-state and out-of-state companies in the retail market." 437 U.S. at 126. The Court held that neither the "fact that the burden of a state regulation falls on some interstate companies" nor the fact that "an otherwise valid regulation causes some business to shift from one interstate supplier to another" was enough, under the circumstances, to establish a Commerce Clause violation. 437 U.S. at 126-27. However, the Court noted in footnote 16 of the opinion that:

> If the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market – as in *Hunt*, 432 U.S., at 347, [97 S.Ct., at 2443] and *Dean Milk*, 340 U.S., at 354, [71 S.Ct. at 297] – the regulation may have a discriminatory effect on interstate commerce. But the Maryland statute has no impact on the relative proportions of local and out-of-state goods sold in Maryland and, indeed, no demonstrable effect whatsoever on the interstate flow of goods.

437 U.S. at 126 n. 16. The Maryland statute had no effect whatsoever on the interstate flow of goods because, regardless of the status of the ultimate retailer, all the petroleum products sold within the state came from out-of-state.

The DABT also relies heavily on the Colorado Supreme Court's decision in *Archer Daniels*. The *Archer Daniels* court upheld a Colorado statute which provided for a sales tax reduction on gasohol containing at least ten percent alcohol derived from agricultural and forest products and limited the reduction to gasohol "produced from no more than three million gallons of alcohol annually from each facility having a design production capacity of seventeen million gallons or less per year." 690 P.2d at 180. As originally enacted, the challenged statute limited the tax break to gasohol made from Colorado-produced alcohol. The statute was challenged as violative of both the Commerce and Equal Protection Clauses of the United States Constitution. The Commerce Clause challenge was based on the fact that no Colorado fuel-alcohol producer had facilities which were large enough to be affected by the production capacity limitation; whereas, several out-of-state producers, including the plaintiff, had facilities with a production capacity of more than seventeen million gallons a year. Relying on the *Exxon* decision, the court concluded that the capacity limitations did not have the effect of discriminating against interstate commerce.

In *Exxon*, the lack of a competitive advantage of in-state independent delaers over out-of-state independent dealers and the fact

that the Maryland regulation at issue had no effect whatsoever on the interstate flow of goods were critical factors. Along with these factors, it appears that both the *Archer Daniels* court and the appellants, sub judice, have overlooked what the United States Supreme court has recognized as the "most critical factor in *Exxon*," the absence of discrimination between interstate and local producer-refiners because there were no local producer-refiners to be favored. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 42 (1980). In contrast, in the instant case, there are clearly manufacturers and distributors of alcoholic beverages made from local products who receive a competitive advantage from the challenged provisions. We find this distinction to be crucial and agree with the appellees that the challenged tax preference scheme places a burden on interstate commerce similar to that found to be present in the *Hunt* case.

In *Hunt*, the Washington State Apple Advertising Commission challenged as violative of the Commerce Clause a North Carolina statute which prohibited the display of state grades on closed containers of apples sold or shipped into the state. The Court held this facially neutral law had "the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them." 432 U.S. at 350. This conclusion was based on the fact that the challenged statute not only raised the cost of doing business for out-of-state dealers, thus, shielding the local apple industry from the competition of Washington apple growers, but also had the effect of "stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system." 432 at 351. Finding no local

flowing from the statute which outweighed the discriminatory burden on interstate commerce and that nondiscriminatory alternatives were available, the *Hunt* Court held that the North Carolina statute violated the commerce clause.

The *Hunt* decision also illustrates that the mere fact that not all out-of-state competitors are disadvantaged by a state statute does not preclude a finding that the statute places a discriminatory burden on interstate commerce. *See also, Mapco, Inc. v. Grunder*, 470 F. Supp. 401. In *Hunt*, prior to the challenged statute's enactment, thirteen states shipped apples into North Carolina for sale. Seven of those states, including Washington, had their own grading systems and thus, were disadvantaged by the statute. 432 U.S. at 349. Despite the fact that the six states which did not have a grading system likely benefited from the same "leveling effect which insidiously operate[d] to the advantage of local apple producers," 432 U.S. at 351, the North Carolina statute was found to place a discriminatory burden in interstate commerce.

After considering the probable effect of the challenged tax scheme on both local and interstate commerce, we perceive the same type of discriminatory burden which was recognized in *Hunt*. It is undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under this scheme are in direct competition with manufacturers and distributors of alcoholic beverages which do not. It is also undisputed that the beverages targeted for preferential treatment are those manufactured from specified crops, all of which will grow in Florida. It is likewise undisputed that alcoholic

beverages made from citrus, sugarcane and the grape species designated in section 564.06 are regarded by consumers as less desirable than alcoholic beverages manufactured from *vinifera* grapes (which cannot be grown in commercial quantities in Florida) and other agricultural bases. With these facts in mind it becomes quite apparent that, just as the North Carolina statute which was struck down in *Hunt*, Florida's alcoholic beverage tax scheme clearly raises the relative cost of doing business for a manufacturer or distributor of alcoholic beverages which are not made from base crops which are "adapted to growing in Florida". And further, by increasing the cost of beverages made from non-designated crops such as *vinifera* grapes and grains relative to beverages made from the designated preferred crops, the challenged tax preference scheme strips away from manufacturers and distributors of those beverages the competitive and economic advantages which naturally flow from marketing beverages which are considered superior by the public. When such a burden on interstate commerce is demonstrated, "the burden falls on the state to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt*, 432 U.S. at 353. *See also, Minnesota v. Cloverr leaf Creamery Co.*, 449 U.S. 456 (1981).

The DABT and intervenors, Jacquin and Todhunter, contend that even if the challenged tax preference scheme is found to burden interstate commerce, it must be upheld because it was enacted to further Florida's legitimate state interest in promoting the use of important Florida agricultural crops and the beverages made from those crops. As stated by the DABT, the preference provisions further the

"legitimate state interest" of "enhancing the flagging receptivity of consumers to alcoholic beverage products made from crops which Florida is adapted to growing." The DABT maintains that its position that a state's interest in promoting its own products is "legitimate" for commerce clause purposes is supported by the Supreme Court's recognition that "a state may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus*, 468 U.S. at 271; *see also Boston Stock Exchange*, 429 U.S. 318, 336 (1977) (States may structure their tax systems "to encourage the growth and development of intrastate commerce and industry.")

We agree with appellees that the stated purpose of promoting use of Florida products will not justify a discriminatory burden on interstate commerce such as that present in this case. The appellants' argument that any burden on interstate commerce is outweighed by the state's interest in promoting alcoholic beverages "made from crops which Florida is adapted to growing" is at odds with the "general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 44. As the United States Supreme Court has recently noted in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985):

> [I]n Bacchus, although we observed as a general matter that "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry," we held that in so doing, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business.

470 U.S. at 876 n.6. (citations omitted)[1]

Not only have the appellants failed to show that a legitimate state concern is being served by the challenged provisions, they have also failed to show the stated local interest could not be promoted as well by alternative means which would have "a lesser impact on interstate activities." *Pike*, 397 U.S. at 142. Indeed, as pointed out by appellee McKesson, several such alternatives have received express judicial approval under the Commerce Clause. For example, the legislature could have provided property tax relief to Florida manufacturers or growers, as was approved in *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 864 (S.D.N.Y 1985). Other less discriminatory alternatives include direct cash subsidies, state-sponsored research, or state-sponsored promotional campaigns for alcoholic beverages made from Florida crops. *See Id.*

We cannot agree with appellant Jacquin's contention that Florida's alcoholic beverage tax scheme is entitled to "great deference because of the Twenty-first Amendment grant to the individual states of extraordinary powers to regulate alcoholic beverages." As noted in *Bacchus*, 468 U.S. at 276, and recently reiterated in *Brown-Forman Distillers v. N.Y. State Liquor Authority*, 106 S.Ct. at 2087, a state

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[1] We also note that promotion of domestic business or industry, when accomplished by imposing a discriminatory tax against out-of-state competitors, is not a legitimate state purpose under the Equal Protection Clause of the United States Constitution. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 882 (1985).

statute is entitled to such deference only when it is determined that the challenged law was enacted to carry out a "purpose of the Twenty-first Amendment." No clear concern of the twenty-first amendment has been shown to be furthered by this tax preference scheme which places an otherwise unjustified and therefore excessive burden on interstate commerce.

We also agree with the appellees that even if the overall preference scheme did not violate the commerce clause by placing an excessive burden on interstate commerce, sections 564.06(9)(a) and 565.12(1)(c)1., (2)(c)1. which deny the tax preference to "alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries" can not stand. A state may not enact discriminatory legislation in "response to another State's unreasonable burden on commerce." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 958 n.18 (1982); *See also Private Truck Council of America, Inc. v. Secretary of State*, 503 A.2d 214, 218 (Me. 1986) (State may not enact discriminatory legislation designed to coerce another state into desisting from a Commerce Clause violation). The Commerce Clause itself provides the remedy for discriminatory taxes or requirements placed on out-of-state products. *See Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976).

Because we find the challenged tax preference scheme violative of the Commerce Clause and affirm the summary judgment on that basis, we need not address the other challenges raised by the appellees.

TAX REFUND

We next consider whether the trial court erred in giving its ruling prospective effect and thereby denying cross-appellants McKesson and Tampa Crown a refund. McKesson argues that only a refund of the difference between the disfavored product's tax rate and the favored product's tax rate will cure the constitutional injury which it has suffered. It maintains that because it has paid the discriminatory taxes under protest, pursuant to section 215.26, Florida Statutes (1985), it is entitled to a refund under both state and federal law. Cross-appellant Tampa Crown makes a similar argument. We agree with the DABT that the prospective nature of the rulings below was proper in light of the equitable considerations present in this case. *See Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla. 1973); *Lemon v. Kurtzman*, 411 U.S. 192 (1973). Not only was the tax preference scheme implemented by the DABT in good faith reliance on a presumptively valid statute, as pointed out by the DABT, if given a refund, cross-appellants would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers.

Accordingly, both those portions of the judgments below finding

> [t]hat the provisions of [Florida Statutes] 564.06(2), (3) following the term "$3.00 per gallon," (4) following the term "3.50 per gallon," (7) and (9) through (13) and [Florida Statutes] 565.12(1)(b), (1)(c), (2)(b), (2)(c) and (5) through (10) are . . . unconstitutional on their face,

and those portions giving the rulings prospective effect are affirmed.

It is so ordered.

McDONALD, C.J., and OVERTON, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Three Consolidated Direct Appeals and a Cross-Appeal of Judgment of Trial Court, in and for Leon County, Charles E. Miner, Jr., Judge, Case Nos. 86-2997, 86-3430 & 86-773

Certified by the District court of Appeal, First District, Case Nos. BS-402, BS-304 & BS-404

Robert A. Butterworth, Attorney General and Daniel C. Brown, Assistant Attorney General, Tax Section, Tallahassee, Florida, for the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation; John K. Aurell and Ricky L. Polston of Aurell, Fons, Radey & Hinkle, Tallahassee, Florida and Howell Ferguson, Tallahassee, Florida, for Jacquin-Florida Distilling Co., Inc; and Bruce Rogow, Fort Lauderdale, Florida and M. Stephen Turner, Tallahassee, Florida, for Todhunter International, Inc.

Appellants/Cross-Appellees

David G. Robertson and Neil S. Berinhout of Morrison & Foerster, San Francisco, California; and Chris W. Altenbernd and Charles A. Wachter of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Tampa, Florida,

for Appellee/Cross-Appellant, McKesson Corporation

Harold F.X. Purnell of Oertel & Hoffman, P.A., Tallahassee, Florida,

for Appellees, Tampa Crown Distributors, Inc. and Florida Beverage Corporation

Barry R. Davidson and Cheryl A. Bell of Steel, Hector & Davis, Miami, Florida,

for Appellee, Brown-Forman Corporation

APPENDIX C

IN THE CIRCUIT COURT OF SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

MCKESSON CORPORATION,

Plaintiff,

vs. CASE NO. 86-2997

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Defendant.
_____/

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR PRELIMINARY INJUNCTION

This matter came to be heard on Motion for Partial Summary Judgment filed by the Plaintiff and the Court having heard argument of counsel and being otherwise advised in the premises hereby finds:

1. Plaintiff is and has been a licensed distributor of beer, wine and distilled spirits in the State of Florida. As a licensed distributor, it

is liable for the payment of alcoholic beverage taxes pursuant to F.S. 564.06 and 565.12 (1985) the legal incidence of which falls on Plaintiff by virtue of its status as a licensed distributor.

2. Plaintiff sells wine subject to the full rates of taxation set forth in F.S. 564.06(1), (2), (3) and (4) and distilled spirits subject to the full rates of taxation set forth in F.S. 565.12(1)(a) and (2)(a). These wines and distilled spirits are not now exempt or entitled to a tax preference pursuant to the provisions of F.S. 564.06 and 565.12 (1985). These alcoholic beverages are manufactured both in states other than Florida and in foreign countries.

3. Such alcoholic beverages sold by Plaintiff compete in the Florida market place with alcoholic beverages of the same type as referred to in paragraph 2 above but which have been granted a tax exemption or tax preference pursuant to the provisions of F.S. 564.06 and 565.12 (1985).

4. The Plaintiff has challenged the constitutionality of F.S. 564.06 and 565.12, including the tax preference provisions found in F.S. 564.06(2), 564.06(3) following the term "$3.00 per gallon," F.S. 564.06(4) following the term "$3.50 per gallon," 564.06(7), and 564.06(9) through (13) and F.S. 565.12(1)(b), (1)(c), (2)(b), (2)(c) and (5) through (10) (1985).

5. Before the United States Supreme Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which held a Hawaii liquor tax exemption for locally produced alcoholic beverages

unconstitutional as a violation of the Commerce Clause, Florida's alcoholic beverage laws granted excise tax exemptions and preferences to alcoholic beverages manufactured or bottled in Florida from Florida grown products. The similarity between these provisions of Florida law, and the Hawaii law struck down in *Bacchus* prompted the Florida Legislature to consider revising the statutes.

6. During the 1985 Florida legislative session, the legislature enacted Committee Substitute for House Bill 521, Florida Session Laws 85-203, and Committee Substitute for House Bill 530, Florida Session Laws 85-204, both effective July 1, 1985, which became sections 564.06 and 565.12, Florida Statutes 91985). The legislature removed the requirement from the former provisions that alcoholic beverages had to be produced from Florida productss and manufactured and bottled in Florida, substituted language identifying certain agricultural products whose use in the production of the alcoholic beverages would entitle the manufacturers and distributors to tax preferences and exemptions, and inserted language denying the tax exemption or tax preference in certain circumstances.

7. These amendments were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverages laws resulting from the *Bacchus* decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violations addressed in *Bacchus*.

Based on the foregoing, it is hereby ORDERED and ADJUDGED:

1. That Plaintiff has standing to challenge the constitutionality of the alcoholic beverage tax statutes.

2. That Plaintiff's Motion for Partial Summary Judgment is hereby granted.

3. That the provisions of F.S. 564.06(2), (3) following the term "$3.00 per gallon," (4) following the term "$3.50 per gallon," (7) and (9) through (13) and F.S. 565.12(1)(b), (1)(c), (2)(b), (2)(c) and (5) through (10) are hereby found to be unconstitutional on their face.

4. That this determination of unconstitutionality shall operate prospectively only from the rendition of this Order.

5. That Plaintiff's Motion for a Preliminary Injunction is hereby granted only to the extent that Defendants' are enjoined from enforcing the statutory provisions declared unconstitutional hereinabove at paragraph 3.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 20th day of March, 1987.

/s/ CHARLES E. MINER, JR.
CIRCUIT JUDGE

Copies furnished to:

David Robertson
Bruce Rogow
M. Stephen Turner

Howell L. Ferguson
Daniel C. Brown

APPENDIX D

SUPREME COURT OF THE STATE OF FLORIDA

No. 70,368

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, AND OFFICE OF THE COMPTROLLER, STATE OF FLORIDA, et al.,
Defendants/Appellants/Cross-Appellees,

v.

McKESSON CORPORATION, et al.,
Plaintiff/Appellee/Cross-Appellant.

APPELLEE AND CROSS-APPELLANT McKESSON CORPORATION'S MOTION FOR REHEARING

Appellee-Cross-Appellant McKesson Corporation ("McKesson"), by and through its undersigned attorneys, pursuant to Florida Rule of Appellate Procedure 9.330, moves for rehearing. McKesson does not wish to reargue the merits of its case but respectfully believes that the Court has overlooked or misapprehended certains points of law and fact in its peremptory denial of any relief for the constitutional injury McKesson has sustained during the period that Florida has collected discriminatory taxes. McKesson submits that the Court's

decision denying relief overlooks both federal law established in similar cases and this Court's own decisions.[1]

The Court in denying McKesson's request for an appropriate refund appears to expand the holding in *Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla. 1973), such that a heretofore-recognized narrow exception to the doctrine has swallowed the doctrine.[2] This Court consistently has provided a refund remedy to taxpayers who paid taxes under an unlawful scheme, although the Court has limited that remedy to those taxpayers who actually filed the suit challenging the validity of the tax scheme.[3] In *Gulesian*, however, the Court allowed a carefully-reasoned exception.

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[1] McKesson will not restate the federal constitutional law arguments that it has already made to this Court. The Court, however, cites *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973), in denying McKesson relief. The United States Supreme Court has not in this century permitted a state to collect or retain taxes assessed under an unconstitutional statute. *Lemon* does not hold otherwise. The Court in *Lemon* did not address a taxpayer's claim for relief from a discriminatory tax burden. Rather, the Court allowed payment pursuant to service contracts for services already rendered, even though the Court earlier had declared the contracts unconstitutional. *Lemon* simply cannot be used to authorize Florida to retain taxes that this Court has held were unconstitutionally collected.

[2] *See Coe v. Broward County*, 358 So.2d 214, 216 (Fla. 4th DCA 1978) (recognizing *Gulesian* as a narrow exception to the rule that a taxpayer is entitled to a refund of taxes paid pursuant to an unlawful assessment).

[3] *See City of Tampa v. Birdsong Motors, Inc.*, 261 So.2d 1, 7 (Fla. 1972); *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So.2d 993, 995 (Fla. 1976); *Osterndorf v. Turner*, 426 So.2d 539, 541, 545 (Fla. 1982); *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984); *Colding v. Herzog*, 467 So.2d 980, 983 (Fla. 1985).

In *Gulesian*, the circuit court, after "weighing equities and considering the slight benefits to individual taxpayers [affected by the invalid tax]," denied a refund of taxes collected under an unconstitutional statute. *Gulesian*, 281 So.2d at 326. Specifically, the circuit court found that plaintiffs and all other taxpayers had voluntarily paid the tax "without protest and not under compulsion;" that the School Board, which had levied the invalid tax, had relied in good faith on a presumtively valid state statute; and that requiring a refund "in small amounts to over 350,000 Dade County taxpayers would impose an intolerable burden on the School Board." *Id.* This Court agreed with the lower court's specific findings and reasoning and, therefore, affirmed.

In this case, however, the circuit court has not made specific findings regarding McKesson's claim for a refund and could not yet weigh the equities because the circuit court has not yet heard evidence on the issue. McKesson in its motions for partial summary judgment and for a preliminary injunction had not yet raised the issue of an appropriate refund. Therefore, when the circuit court decided to bar any relief for the injury McKesson has sustained during the period that Florida has collected the discriminatory taxes, it acted without first hearing evidence on the refund issue.[4] McKesson has not had the

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[4] McKesson raised the refund issue in this Court, as a cross-appellant, in response to the lower court's statement that its

opportunity to present its evidence to the lower court establishing the effect of the discriminatory tax burden on McKesson's business in Florida, including the effect on McKesson's sales, market share, and profit. In sum, McKesson has never had the opportunity to demonstrate the extent of the very competitive injury that this Court recognized in striking down the unconstitutional statutes.

Unlike the 350,000 taxpayers in *Gulesian* who were only slightly affected by the improper assessment, McKesson, which did pay the challenged tax under protest and did pay under compulsion, has incurred a substantial injury under a discriminatory scheme. Further, the State in this case did not *rely* on invalid statutes but rather *enacted* the unconstitutional statutes.[5]

By applying *Gulesian* in this case to bar any remedy, without first instructing the lower court to hear evidence and weigh the particular equities in this case, the Court appears to expand the narrow holding in *Gulesian* to bar any refund of taxes collected under an unconstitutional statute so long as the statute was presumptively valid before it was declared

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declaration of unconstitutionality would operate only prospectively, thereby barring any refund.

[5] McKesson maintains that the State enacted the revised statutes to preserve the protectionism inherent in the former statutory scheme, and acted after the Florida Department of Business Regulation warned in a memorandum that the revised statutes continued the unconstitutional discriminatory effect of the old scheme.

unconstitutional. McKesson submits that under such a doctrine no taxpayer will ever be entitled to a refund for unconstitutional taxes.

The Court's statement that "the cost of the tax has likely been passed on to their customers" (P. 16) should not serve to bar McKesson's opportunity to present evidence on the measure of its injury. First, the circuit court has not heard evidence on this "pass-on" issue. Second, regardless of whether the cost of the discriminatory tax has been passed on to McKesson's customers, McKesson has sustained an economic injury in the competitive marketplace. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), the Supreme Court observed: "even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages."

Whether McKesson raised the price of its products to cover the added tax burden that the discriminatory tax scheme imposed, thereby selling fewer products than it otherwise would have, or did not raise the price of its products to cover the added burden, thereby reducing its profit margin, McKesson has been injured.[6]

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[6] The alcoholic beverage excise tax is significantly different from the general sales tax, which is stated separately from an item's purchase price and for which retailers simply serve as collection agents for the state. *See* § 212.07(l)(a) and (2), Fla. Stat. (Supp. 1987)

Further, this Court plainly found that McKesson has sustained a competitive injury.

> It is undisputed that manufacturers and distributors of beverages which qualify for preferential treatment under this scheme are in direct competition with manufacturers and distributors of alcoholic beverages which do not . . . . Florida's alcoholic beverage tax scheme clearly raises the relative cost of doing business for a manufacturer or distributor of alcoholic beverages which are not [favored].

(P. 12-13)

The Florida alcoholic beverage tax scheme, by design, has imposed an unconstitutional burden on McKesson by raising its cost of doing business compared to distributors of the favored products. That burden continued even after the lower court declared the discrimination unconstitutional because the State's appeal invoked the automatic stay, Fla. R. App. P. 9.310(b)(2), which the lower court declined to lift.

McKesson respectfully urges the Court to determine that McKesson is entitled, under both federal constitutional law and state law, to receive a refund of the difference between what McKesson paid in taxes and what McKesson would have paid if its products had received the same treatment as the favored products. McKesson requests that the Court thereupon remand the case to the lower court to receive evidence to determine the amount of an appropriate refund.

Alternatively, McKesson respectfully requests that the Court remand this case to the lower court with instructions to

hear evidence on the issue of McKesson's competitive injury, including evidence on the effect of the discriminatory burden on McKesson's business in Florida, and then to weigh the particular equities and determine the measure of any relief.

DATED: March 3, 1988.

Respectfully submitted,
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APPENDIX E

SUPREME COURT OF FLORIDA
Monday, May 2, 1988

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, etc., et al.,	CASE NO. 70,368
Appellants/Cross-Appellees,	Circuit Court Nos. 86-2997, (Leon) 86-3430 & 86-773
v.	
McKESSON CORPORATION, et al.,	District Court of Appeal, 1st District – Nos. BS-402, BS-304 & BS-404
Appellees/Cross Appellants.	

Upon consideration of the Motion for Rehearing filed in the above cause by attorneys for McKesson Corporation, the Motion for Rehearing filed by attorneys for Tampa Crown Distributors, Inc., and the Motion for Rehearing filed by attorneys for attorneys for Jacquin-Florida Distilling co., Inc. and Todhunter International, Inc., and responses thereto,

IT IS ORDERED that said Motions be and the same are hereby denied, and it is further

ORDERED that the Motion for Stay of the Mandate Should the Pending Motion for Rehearing be Denied filed by attorneys for Jacquin-Florida Distilling and Todhunter International is hereby denied.

[SEAL]

cc: Hon. Raymond E. Rhodes, Clerk
Hon. Charles E. Miner, Jr., Judge
Hon. Paul F. hartsfield, Clerk

David G. Robertson, Esquire
Neal S. Berinhout, Esquire
Chris W. Altenbernd, Esquire
Charles A. Wachter, Esquire
M. Stephen Turner, Esquire
Daniel C. Brown, Esquire
Harold F.X. Purnell, Esquire
Barry R. Davidson, Esquire
Jack M. Coe, Esquire
Bruce S. Rogow, Esquire
Howell L. Ferguson, Esquire
Joseph Klock, Esquire
John K. Aurell, Esquire

APPENDIX F

Mandate
Supreme Court of Florida

To the Honorable, the Judges of the Circuit Court in and for Leon County, Florida

WHEREAS, in that certain cause filed in this Court styled:

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, etc., et al.
-vs-
McKESSON CORPORATION, et al.

Case No. 70,368
Your Case No. 86-2997, 86-3430, 86-773

The attached opinion was rendered on February 18, 1988,

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Parker Lee McDonald
Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 2nd day of May 1988

[SEAL]

APPENDIX G

CHAPTER 564
WINE

564.06 Excise taxes on wines and beverages; exemptions.

564.06 Excise taxes on wines and beverages; exemptions.–

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of $2.25 per gallon.

(2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, manufactured in Florida form Florida-grown fresh fruits, berries, or grapes and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in Florida and bottled in Florida, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight manufactured and bottled in Florida form Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries and mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by subsection (1) shall not apply.

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by manufacturers and distributors a tax at the rate of $3 per gallon, except that this tax shall not be required to be paid upon all wines manufactured in Florida form fresh fruits, berries, or grapes grown in Florida and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in this state, bottled within this state, and containing 14 percent or more of alcohol by weight.

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of $3.50 per gallon, except that this tax shall not be required to be paid upon all natural sparkling wines manufactured in Florida from fruits, berries, or grapes grown in Florida and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in this state and bottled within this state.

(5) As to all beverages taxed under this section which are manufactured or bottled in Florida, there shall be a 2-percent discount allowed to the manufacturer or bottler on the amount of taxes assessed against wine for his losses form shrinkage, in filtering, breakage, and waste in bottling, the 2 percent to be computed on the taxable amount assessed by the state when sold taxpaid; and the 2 percent shall be deducted by the manufacturer or bottler on his monthly report.

(6) Wine used by any established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(7) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance shall be granted or permitted with the tax is delinquent at the time of payment.

(8) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.

(9) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

CHAPTER 565
LIQUOR

565.12 Excise tax on liquors and beverages.–

(1)(a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $6.50 per gallon.

(b) As to all such beverages manufactured and bottled in this state from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries, and mangoes, and not form concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of $4.15 per gallon.

(2)(a) As to beverages containing more than 48 percent alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $9.53 per gallon.

(b) As to all such beverages manufactured and bottled in this state from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries, and mangoes, and not form concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by paragraph (a) does not apply. However, in lieu

thereof there shall be paid by every manufacturer and distributor a tax a the rate of $4.75 per gallon.

(3) The use of the words "and vendor" in paragraphs (1)(a) and (2)(a) shall not be construed as imposing a new excise tax based upon sale at retail, but shall only be construed as applying the increase in tax rates to vendors' inventories of stock on June 1, 1968.

(4) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

APPENDIX H

BEVERAGE LAW: ADMINISTRATION

564.06 Excise taxes on wines and beverages; exemption.–

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of $2.25 per gallon

(2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcohol content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shutleworthii, Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcohol content is manufactured exclusively from citrus fruits, varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana*, or *Vitis berlandieri*, citrus products, citrus byproducts, sugarcane, sugarcane byproducts, or from concentrates thereof, except for flavoring extracts, the tax imposed by subsection (1) shall not apply.

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by

manufacturers and distributors a tax at the rate of $3 per gallon except that this tax shall not be required to be paid upon all wines of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts., and containing 14 percent or more of alcohol by weight.

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of $3.50 per gallon except that this tax shall not be required to be paid upon all natural sparkling wines of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana*, or *Vitis berlandieri*, or from concentrates thereof, except for flavoring extracts.

(5) Wine used by an established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(6) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance shall be granted or permitted when the tax is delinquent at the time of payment.

(7) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.

(8) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(9) The exemptions from payment of taxes provided in subsections (2), (3), and (4) or the tax rates set forth in subsection (10) shall not apply:

(a) To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

(b) To alcoholic beverages manufactured or bottled in states, territories, or countries tries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

(c) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Funding for research purposes or retail sale of wine at licensed wineries shall not be construed as an "economic incentive or advantage" within the meaning of this subsection.

(10)(a) For the months of July and August each year the tax rate for the products specific din subsection (2), except for wine coolers which are defined below in paragraph (b), shall be $2.25 per gallon. Otherwise, the tax rate for these products, except wine coolers, will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of the products specified in subsection (2).

Total gallons sold in the month prior to the time of calculation	The new per gallon tax rate for all gallons sold in the month following the time of calculation
0 - 10,000	0.00
10.001 - 20,000	0.35
20,001 - 30,000	0.55
30,000 - 40,000	0.75
40,001 - 50,000	0.95
50,001 - 60,000	1.15
60,001 - 70,000	1.25
70,001 - 80,000	1.45
80,001 - 90,000	1.65
90,001 - 100,000	1.85
100,001 - 110,000	2.05
Above 110,000	2.25

(b) For the months of July and August 1985, 40 cents per gallon will be the tax for wine coolers; a combination of wine, as described in subsection (2); carbonated water; and flavors of fruit juices and preservatives containing 1 to 6 percent alcohol content by volume. Thereafter, the tax rate for wine coolers will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of wine coolers.

2. The total of sales referred to in subparagraph 1, of this paragraphs shall determine the sole tax rate applicable to all gallons sold in e month after the time of calculation according to the table set forth below:

Sales of wine coolers in the month prior to the time of calculation for each month for the 6-month period of March, April, May, June, July, and August	The new per gallon tax rate for all gallons sold in the month following the time of calculation
0 - 250,000	0.40
250.001 - 275,000	0.65
275,001 - 300,000	0.90
300,001 - 325,000	1.15
325,001 - 350,000	1.40
350,001 - 375,000	1.65
375,001 - 400,000	1.90
Above 400,000	2.25

Sales of wine coolers in the month prior to the time of calculation for each month for the 6-month period of September, October, November, December, January, and February	The new per gallon tax rate for all gallons sold in the month following the time of calculation
0 - 100,000	0.40
100.001 - 125,000	0.65
125,001 - 150,000	0.90
150,001 - 175,000	1.15
175,001 - 200,000	1.40
200,001 - 225,000	1.65
225,001 - 250,000	1.90
250,001 - 275,000	2.15
Above 275,000	2.25

(c) For the months of July and August each year, the tax rate forth products specified in subsection (3) shall be $3 per gallon. Thereafter, the tax rate for these products will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of these products.

2. The total of sales referred to in subparagraph 1, of this paragraph, shall determine the sole tax rate applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Total gallons sold in the month prior to the time of calculation	The new per gallon tax rate for all gallons sold in the month following the time of calculation
0 - 12,500	1.50
Above 12,500	3.00

(c) For the months of July and August each year, the tax rate forth products specified in subsection (4) shall be $3 per gallon. Thereafter, the tax rate for these products will be determined as follows:

1. By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of these products.

2. The total of sales referred to in subparagraph 1, of this paragraph shall determine the sole tax rate applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Total gallons sold in the month prior to the time of calculation	The new per gallon tax rate for all gallons sold in the month following the time of calculation
0 - 2,000	1.50
20.001 - 4,000	2.00
4,001 - 6,000	2.50
6,001 - 8,000	3.00
Above 8,000	3.50

(e) By the 25th of each month, the Department of Business Regulation shall notify all distributors in the state of the new tax rates applicable for the following month base don preceding paragraphs (10)(a), (b), (c), and (d).

(11) Any new applicant for the tax exemptions provided in subsection (2), subsection (3), or subsection (4), or for the tax rates set forth in paragraph (10)(a), paragraph (10)(b), paragraph (10)(c)(, or paragraph (10)(d), shall apply for those rates between July 1 and July 31 of each year, and shall pay an annual nonrefundable application fee of $3,000. The division shall adopt appropriate rules of practice and procedure to establish a method of qualification for affected parties.

(12) Each manufacturer authorized to do business under the tax exemption provide din subsection (2), subsection (3), or subsection (4), or for the tax rates set forth in paragraph (10)(a), paragraph (10)(b), paragraph (10)(c), or paragraph (10(d), shall pay an annual license fee of $1,000 plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. Each qualifying applicant shall rep monthly the source of raw materials used to manufacture the products eligible for the tax exemptions or rates set forth in subsection (2), subsection (3), or subsection (4), or paragraph (10)(a), paragraph (10)(b), paragraph (10)(c), or paragraph (10)(d).

(13) All revenue collected pursuant to subsections (11) and (12) shall go directly to the Department of Business Regulation to provide funds to administer the provisions contained herein.

565.12 Excise tax on liquors and beverages.–

(1)(a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $6.50 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of $4.35 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(2)(a) As to beverages containing more than 48 percent of alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $9.53 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of $4.95 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1. To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3. To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(3) The use of the words "and vendor" in paragraphs (1)(a) and (2)(a) shall not be construed as imposing a new excise tax based upon sale at retail, but shall only be construed as applying the increase in tax rates to vendors' inventories of stock on June 1, 1968.

(4) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(5) For the months of July and August every year the tax rate for products specified in paragraph 9(1)(b) will be $6.50 per gallon and the tax rate for the products specified in (2)(b) will be $9.53 per gallon. Thereafter the tax rate for the products in paragraph (1)(b) and in paragraph (2)(b) will be determined in paragraph (6).

(6) By the 20th of each month (hereinafter, the time of calculation) commencing August 20, 1985, the Department of Business Regulation shall determine the increase or decrease in the sale of alcoholic beverage gallonage taxed at the rates provided in paragraph (1)(b) or paragraph (2)(b) for the prior month in comparison to that month of the year before. If that gallonage has increased, the percentage amount of said increase in excess of 5 percent shall be the percentage increase in the tax rates provided in paragraph (1)(b) or paragraph (2)(b) for the gallonage sales for the month following the "time of calculation." If the gallonage has decreased, the percentage amount of said decrease in the tax rates provided in paragraph (1)(b) or paragraph (2)(b) for the gallonage sales for the month following "the time of calculation." However, the tax rate provided in paragraph (1)(b) shall not decrease below

$4.35 per gallon or increase above $6.50 per gallon, dn the tax rate provide din paragraph (2)(b) shall not decrease below $4.95 per gallon or increase above $9.53 per gallon.

(7) By the 25th of each month, the Department of Business Regulation shall notify all distributors in the state of the new tax rates applicable for the following month base don subsection (6).

(8) All revenue collected pursuant to subsections (9) and (10) shall go directly to the Department of Business Regulation to provide funds to administer the provisions contained herein.

(9) Any manufacturer or importer applying for the tax rate provide din paragraph (1)(b) or paragraph (2)(b) shall apply for that rate between July 1 and July 31 of each year and shall pay a nonrefundable application fee of $5,000. The department shall adopt appropriate rules of practice and procedure to establish a method of qualification for affected parties.

(10) Each manufacturer authorized to do business under the tax rates imposed under paragraph (1)(b) or paragraph (2)(b) shall pay an annual license fee of $3,000, plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. Each qualifying applicant shall report monthly the source of raw materials used to manufacture the products eligible for the tax rates provided in paragraphs (1)(b) and (2)(b).

APPENDIX I

FLORIDA SENATE BILL S.B. 1326
(Enrolled as Chapter 88-308 on July 7, 1988)

* * * *

Section 9. Effective July 1, 1988, the Legislature finds and determines that the authorized transportation and importation into the state of alcoholic beverages described in chapters 564 and 565, Florida Statutes, require strict enforcement of state statutes regulating and administering the manufacture, distribution and sale of alcoholic beverages; the costs of regulating and administering such imported alcoholic beverages are greater than for those alcoholic beverages not imported; the production of lower quality alcoholic beverages should be discouraged; and in order to protect the health, safety, welfare and economic integrity of the state, the costs of ensuring compliance with relevant state laws should be included in the taxes imposed upon said alcoholic beverages.

Section 10. (1) Effective July 1, 1988, section 564.06, Florida Statutes, is amended to read:

564.06 Excise and import taxes on wines and beverages.–

(1)(a) As to beverages including wines, except natural sparkling wines and malt beverages, containing 0.5 percent or more alcohol by volume and less than 17.259 percent alcohol by volume, there shall be paid by all manufacturers and distributors a tax at the rate of $.25 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of all beverages including wines, except natural sparkling wines and malt beverages, containing 9.5 percent or more alcohol by volume and less than 17.259 percent alcohol by volume, an import tax in the amount of $2.00 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(2)(a) As to all wines, except natural sparkling wines, containing 17.259 percent or more alcohol by volume, there shall be paid by manufacturers and distributors a tax at the rate of $.50 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of all wines, except natural sparkling wines, containing 17.259 percent or more alcohol by volume, an import tax in the amount of $2.50 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(3)(a) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of $1.50 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of natural sparkling wines an import tax in the amount of $2.00 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(4)(a) As to wine coolers, which are a combination of wines containing 0.5 percent or more alcohol by volume, carbonated water, and flavors or fruit juices and preservatives and which contain 1 to 6 percent alcohol content by volume, there shall be paid by all manufacturers and distributors a tax at the rate of $.75 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of wine coolers as described in paragraph (a) an import tax in the amount of $1.50 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(5) Wine used by any established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(6) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance shall be granted or permitted when the tax is delinquent at the time of payment.

(7) All beverages taxed under paragraphs (1)(a), (2)(a), (3)(a), or (4)(a) and manufactured within this state for sale in this state, if fortified, shall be fortified with alcohol, except for flavoring extracts, distilled above 185 proof from produce of agricultural land inspected by Florida agricultural inspectors. All wines taxed under paragraphs (1)(a), (2)(a), (3)(a) or (4)(a) and manufactured within this state for sale in the state shall be made of produce from land inspected by Florida agricultural inspectors.

(8) The excise and import taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(9) The department is authorized to promulgate rules to effectuate the provisions of this section.

(2) It is the legislative intent that if any amendatory provision of this section is held invalid by an interlocutory decree, while in effect, or final decree or order of a court of competent jurisdiction, the provisions of s. 564.06, Florida Statutes, as it existed on the day prior to the effective date of this section, shall then be revived and

shall be the law of this state, except as to such provisions of s. 564.06, Florida Statutes, which have heretofore been held unconstitutional by the Florida Supreme Court, and except that any amendments to such section enacted other than by this section shall be preserved and continue to operate to the extent that such amendments are not dependent upon the portions of said section which expire pursuant to the provisions of this section.

Section 11. (1) Effective July 1, 1988, section 565.12, Florida Statutes, is amended to read:

565.12 Excise and import tax on liquors and beverages.–

(1)(a) As to beverages containing 17.259 percent or more of alcohol by volume and not more than 55.780 percent of alcohol by volume, except wines, there shall be paid by every manufacturer and distributor a tax at the rate of $4.75 per gallon. As to beverages containing less than 17.259 percent of alcohol by volume, there shall be paid by every manufacturer and distributor a tax at the rate provided in chapter 564.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of beverages containing 17.259 percent or more of alcohol by volume and not more than 55.780 percent of alcohol by volume, an import tax in the amount of $1.75 per gallon to be paid by every manufacturer and distributor.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to

ensure that these taxes will only be collected once in accordance with s. 561.50.

(2)(a) As to beverages containing more than 55.780 percent of alcohol by volume, there shall be paid by every manufacturer and distributor a tax at the rate of $5.95 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of beverages containing more than 55.780 percent of alcohol by volume, an import tax in the amount of $3.58 per gallon to be paid by every manufacturer and distributor.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(3) The excise and import taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(4) All beverages distilled in this state for sale in this state shall be distilled above 185 proof, except for flavoring extracts, of produce from land inspected by Florida agricultural inspectors.

(5) The department is authorized to promulgate rules to effectuate the provisions of this section.

(2) It is the legislative intent that if any amendatory provision of this section is held invalid by an interlocutory decree, while in effect, or final decree or order of a court of competent jurisdiction, the provisions of s. 565.12, Florida Statutes, as it existed on the day prior to the effective date of this section, shall then be revived and shall be the law of this state, except as to such provisions of s. 565.12, Florida Statutes, which have heretofore been held unconstitutional by the Florida Supreme Court, and except that any amendments to such section enacted other than by this section shall be preserved and continue to operate to the extent that such amendments are not dependent upon the portions of said section which expire pursuant to the provisions of this section.

Section 12. In the event that a court of competent jurisdiction determines any of the provisions of s. 564.06 or s. 565.12 as amended by this act to be unconstitutional, it is the intent of the legislature that the amendments to s. 564.06 and s. 565.12 contained in this act shall be null and void and that those sections revert to the language existing in said sections on June 30, 1988.

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